Wairimu v Republic (Criminal Appeal 52 of 2020)
[2023] KEHC 2103 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2103 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 52 OF 2020

JM CHIGITI, J

MARCH 9, 2023

BETWEEN

ANDREW MUIGAI WAIRIMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the sentence of Hon C.M. MAKARI, SRM in Gatundu SRM Criminal Case No 539 of 2018 delivered on 6thMarch, 2019)

JUDGMENT

1. The appellant herein was charged with the offence of being in possession of cannabis [bhang] contrary to Section 3(1)(a) as read with Section 3(2) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 4 of 1994.

2. It was alleged that on May 10, 2018, at Nyamangara village in Gatundu Sub-county within Kiambu County was found in possession of Cannabis (Bhang) to wit 10 grams with street value of Kshs 30/= which was not in its medicinal preparation form.

3. The Appellant was arraigned in court on May 11, 2018, and the charge and particulars were read out to him, he denied the allegation and a plea of not guilty was entered. On February 4, 2019, an amended charge sheet was read out to the accused and pleaded not guilty and the plea of not guilty was maintained.

4. The matter proceeded for trial, and the trial court found the accused guilty and convicted him to pay a fine of Kshs 15,000/= and in the alternative to serve 3 months in prison.

5. Aggrieved by the said conviction and sentence, the Appellant filed this Appeal vide a Memorandum of Appeal dated July 22, 2020 setting out the following grounds of Appeal, summative:

    i. That the learned magistrate erred in law and in fact in failing to give the appellant a chance to properly mitigate his case.

    ii. That the learned magistrate erred in law and in fact in convicting and sentencing the appellant based on a defective charge sheet.

    iii. That the learned magistrate erred in law and in fact in failing to warn the appellant of the seriousness of the offence and the consequences thereof.

    iv. That the learned magistrate erred in law and in fact in failing to appreciate that the appellant was ignorant of the law and the resultant punishment thereof.

    v. The learned magistrate erred in law and in fact by considering the appellant's criminal records even after being informed that the appellant was a first time offender.

    vi. That the learned magistrate erred in law and in fact by convicting the appellant based on facts which were misguided illegal and unlawful as presented by the prosecution to the trial court.

    vii. That the learned trial magistrate erred in law and in fact by failing to give the appellant sufficient time to consider the case to be able to make his independent mind legally.

    viii. The learned magistrate erred in law and in fact by the failing to appreciate that the appellant may have been ignorant hence taking the appellant's ignorance to punish him.

    ix. That the learned magistrate erred in law and in fact by failing to warn herself that the whole proceedings and judgment thereof were unconstitutional and infringed the rights of the appellant.

    x. That the learned magistrate erred in law and in fact by imposing a manifestly excessive and illegal sentence against the weight of the charge and the evidence on record.

    xi. The learned magistrate erred in law and in fact in failing to act as a neutral referee or arbiter and basing her conviction on the appellant's ignorance

    xii. That in view of the circumstances of the case, the sentence were manifestly excessive.

6. The Appellant urged this court to quash his conviction and set aside the sentence, and that the sentence be reduced.

7. At the hearing of the case, the parties filed submissions.

Appellant's submissions

8. The Appellant, who was in person, filed submissions on March 15, 2022, in which he submitted that the prosecution did not link the cannabis to him (the Appellant); and that the issue of government chemist was not proved unless the prosecution had kept the substance within the presence and in the

visibility of the Appellant and the Appellant was entitled to know the process that would reveal the drugs.

9. He also submitted that the court used legal terms not known to him, and that he did not have knowledge on the effect of cross- examination. The Appellant submitted that it was a set up and he blamed the police for earlier differences between himself (the Appellant) and the police officers.

Respondent's submissions

10. The Respondent in opposing the Appeal in its entirety, filed submissions on January 25, 2023. It was submitted that for a court to convict a person it must satisfy itself that the prosecution has established the ingredients beyond a reasonable doubt.

11. Counsel submitted that the prosecution proved that the Appellant was in possession of the 10 grams of cannabis, the evidence of PW2 corroborated that of PW1 on how they entered the house of the Appellant, searched his house, and obtained the cannabis. That as per the government chemist report, the exhibit it was confirmed to be cannabis.

12. Counsel further submitted that the substances were recovered from the Appellant's house; while the Appellant denial was uncorroborated. It was submitted that the prosecution proved the elements to the required standard during trial, and urged the court to dismiss the Appeal, and uphold the findings of the trial court.

Analysis and determination__**

13. An appellate court will not interfere with the sentencing of the trial court unless it is satisfied that the trial court misdirected itself. In the case of *Ogolla s/o Owuor vs Republic, [1954] EACA 270*, pronounced itself on this issue as follows: -

> ' The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.'

14. This being a first appeal to the High Court, it is an Appeal on both facts and the law. I am well aware of the duty of the first appellate court which was succinctly captured by the Court of Appeal in *Kiilu & Another V Republic, [2005] eKLR*, as follows:

> ' An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.
>
> It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion; it must make its own findings and draw its own conclusion. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.'

15. Sentencing is the discretion of the trial court and thus an appellate may not interfere with the sentencing, unless it is shown that the trial court in sentencing applied irrelevant facts.

16. I will first analyze the trial court evidence.

Trial court evidence

17. The prosecution called 2 witnesses to prove its case. PW1 CPL Urbanis testified that on May 10, 2018, at 5.00 pm together with his colleague PC Kilonzo, Chief Patricia from Kairi, PC Langat and Other officers from Kamwangi were on patrol to do a crackdown on people dealing with drugs. They were led to the Appellant house by the Chief after she informed them the Appellant dealt in cannabis. According to PW1, he entered with PC Langat to the Appellant house and found him sitting at the sitting room, upon searching the house they found some cannabis hidden under the sofa set cushion. PC Kilonzo made the recovery. The Appellant was then arrested. He produced the 10 grams of cannabis recovered from the accused house. In cross-examination PW1 said the amendment in the charge sheet was a human error.

18. PW2, PC Lassel Kioko testified that she was the investigating officer at Kamwangi police station. That on May 5, 2018 while on operation with 15 other officers, and the area assistant chief Nyamangara called Patricia, informed them of the Appellant involvement in cannabis and led them to the Appellant house. The back door was open and 3 officers entered into the house. Upon searching the Appellant house, they found 10 grams of cannabis under the sofa set, under the cushion and arrested the Appellant. PW2 confirmed to have made the recovery, and adduced a copy of the report that confirmed the substance obtained from the Appellant was cannabis.

19. The Appellant denied committing the offense, and alleged that on the material day, he was at home sleeping when he heard people knocking at his door, that and he woke up and recognized the voice of PW1, who told him to open the door. The Appellant informed the court that upon opening the door PW1 handcuffed Appellant and started conducting a search. According to the Appellant, the officers did not recover anything from his house, nonetheless he was taken to the police station.

Determination

20. After my own independent appraisal of the evidence on record, I find that the prosecution witnesses were consistent in their evidence regarding the recovery.

21. On the Appeal against sentence, the Appellant's complaint was that the trial court failed to consider his mitigation and passed a sentence that was harsh and excessive in the circumstances.

22. The Court of Appeal in *Robert Mutungi Muumbi V Republic, [2015] eKLR*, cited with approval its decision in *Bernard Kimani Gacheru Vs. Republic, [2002] eKLR* where it held thus:

> ' It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.'

23. I have perused the trial court file, which indicated that the Appellant was convicted to pay a fine of Kshs 15,000/= and in the alternative, serve 3 months' imprisonment.

24. Section 3(2) of the Narcotic Drugs and Psychotropic Substance (Control) Act stipulates that:-

> ' A person guilty of an offence under subsection (1) shall be liable— in respect of cannabis, where the person satisfies the court that the cannabis was intended solely for his own consumption, to imprisonment for ten years and in every other case to imprisonment for twenty years;'

25. Further, the 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

> 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
> 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
> 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.
> 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
> 5. Community protection: To protect the community by incapacitating the offender.
> 6. Denunciation: To communicate the community's condemnation of the criminal conduct.'

26. The trial court in its judgment opined that the prosecution proved that the Appellant was found in possession of cannabis. The evidence of PW1 was corroborated by that of PW2; as they narrated on how they obtained the cannabis from the house of the Appellant after information received from the area assistant chief who led them to the Appellant's house.

27. The Prosecution was also able to prove that the substances recovered from the Appellant was cannabis, as per the report adduced as an exhibit.

28. In my view, the Trial court sentenced the Appellant in accordance with the law. The trial magistrate exercised her discretion judiciously when he fined the Appellant kshs 15,000/- or in default serve 3 months imprisonment. In my view the sentence was lenient.

29. From my reading of the ruling on sentencing, reveals that the learned trial magistrate considered all relevant factors including the quantity and value of the drugs the Appellant was found trafficking. Taking into account the maximum penalty prescribed by the law, for the offence and the devastating effects the drug menace has had on our society - particularly the youth. I am satisfied that the sentence meted out on the Appellant was not harsh or excessive in the circumstances of this case. That sentence is therefore affirmed.

30. The court record shows that in sentencing the Appellant, the trial court did not take into account the period of 4 months and 11 days which the Appellant had spent in lawful custody prior to his release

on cash bail on July 28, 2017. In accordance with the provisions of Section 333 (2) of the *Criminal Procedure Code*, that period shall be taken into account in computing the Appellant's sentence.

Order:

31. For the foregoing reasons, the Appeal filed on October 21, 2020, lacks merit and the same is dismissed. The court declines to quash the conviction and sentence of the trial court.

DELIVERED AT KIAMBU THIS 9TH DAY OF MARCH, 2023.

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JUSTICE CHIGITI, SC

JUDGE

In the Presence of;